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15 STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD
16

17 In the Matter of the Protests of
VALLEJO CJD, LLC and FAIRFIELD CJD, LP,
18
19 Protestants,
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21 v.
FCA US LLC,
22 Respondent.
23
24
25

**Consolidated Protest Nos. PR-2589-18,
PR-2590-18, PR-2591-18, PR-2592-18,
PR-2593-18, PR-2594-18, PR-2595-18,
PR-2596-18**

**REPLY IN SUPPORT OF
RESPONDENT FCA US LLC'S
MOTION TO DISMISS PROTESTS,
OR, IN THE ALTERNATIVE, FOR A
FINDING OF GOOD CAUSE TO
TERMINATE BASED ON
UNCONTESTED EVIDENCE**

26 Robert E. Davies and Mary A. Stewart of the law firm of Donahue Davies LLP, Post Office
27 Box 277010, Sacramento, California 95827, and Roger H. Stetson, Jack O. Snyder, Jr., and David B.
28 Lurie of the law firm Barack Ferrazzano Kirschbaum & Nagelberg LLP, 200 West Madison Street,

1 Suite 3900, Chicago, Illinois 60606, hereby reply in support of the Motion to Dismiss Protests or, in
2 the Alternative, for a Finding of Good Cause to Terminate Based on Uncontested Evidence (the
3 “Motion”) filed on January 11, 2019 by Respondent FCA US LLC (“FCA US”), and in so doing
4 respond to the February 12, 2019 opposition brief (the “Opposition”) filed by Vallejo CJD LLC d/b/a
5 Momentum Chrysler Dodge Jeep RAM of Vallejo (“Momentum Vallejo”) and Fairfield CJD, LP d/b/a
6 Momentum Chrysler Dodge Jeep RAM of Fairfield (“Momentum Fairfield”; collectively,
7 “Momentum”).

8 INTRODUCTION

9 In its Motion, FCA US demonstrated, based on uncontested evidence, that Momentum failed to
10 timely file its Protests, and that Momentum is in receivership, is insolvent, and has permanently gone
11 out of business, thus mooted the Protests and entitling FCA US to a finding of good cause to terminate
12 as a matter of law. Momentum’s Opposition does not contest the clear evidence relating to the
13 timeliness, mootness, and good-cause issues, but instead raises a series of inaccurate and self-
14 contradictory legal arguments. Momentum’s sole timeliness argument is that Rahim Hassanally “never
15 received” FCA US’s Notices of Termination (the “Notices”), yet Momentum *expressly admitted* in its
16 Protest filings that it had received the Notices, and even in its Opposition Momentum does not dispute
17 that the Notices were received by both Momentum’s registered agent and the dealerships. Momentum’s
18 only other argument against dismissal is that its franchises have potential buyers and resale value, but
19 California law—including the cases cited in the Opposition—establishes that a dealer’s sale prospects
20 cannot prevent termination where the dealership has gone out of business.

21 ARGUMENT

22 As set forth herein, each of Momentum’s arguments is without merit.

23 **A. Whether Rahim Hassanally Personally Received the Notices Is Irrelevant, Because Both** 24 **Dealers Received Them, as Momentum Admits.**

25 Momentum does not dispute that the Notices were delivered to the office of Christian Scali,
26 Momentum’s agent for service of process, on December 3, 2018. Nor does Momentum dispute that the
27 Notices were delivered to the dealerships’ mailing addresses the following day, or that the Protests
28 would be untimely if Momentum’s ten-day window to protest under Vehicle Code § 3060(a) began on

1 either December 3 or December 4. Instead, Momentum argues that “the dealer, Rahim Hassanally,
2 never received the notice of termination,” and that the signatures from receipt at Mr. Scali’s office and
3 both dealerships’ premises are insufficient to start the ten-day clock. (Opposition at 4.). This argument
4 is legally inaccurate and contradicted by Momentum’s own pleadings.

5 Momentum has alleged that it received the Notices. (*See, e.g.*, Protest No. PR-2589-18, at ¶ 6
6 (acknowledging that Momentum Vallejo “received a letter from FCA dated November 30, 2018 []
7 purporting to give Vallejo CDJR 15-day notice of termination” (emphasis added)), PR-2593-18, at
8 ¶ 6 (same for Momentum Fairfield).) There can be no dispute, and Momentum does not dispute, that it
9 received the Notices. Yet Momentum submits a sworn declaration from Rahim Hassanally, its
10 president, in which Mr. Hassanally claims that *he* never received the Notices. (Opposition, Hassanally
11 Decl. at ¶ 4). Momentum’s position in its Opposition appears to be that Momentum’s receipt of the
12 Notices is not determinative, and that Rahim Hassanally must have *personally* received the Notices to
13 start the ten-day clock.

14 Momentum is wrong, because Rahim Hassanally is not the “dealer” or protesting “franchisee”
15 under Momentum’s dealer agreements and the California Vehicle Code. Rather, the parties to the
16 respective dealer agreements, with notice and protest rights under Section 3060—and which in fact filed
17 these Protests—are Fairfield CJD, LP and Vallejo CJD, LLC, two California business entities. (*See*
18 Momentum’s dealer agreements, at Motion, Wong Decl., Ex. 3.A-B.) It is irrelevant whether Mr.
19 Hassanally (or any other particular individual, for that matter) personally received the Notices, because,
20 as demonstrated by uncontested evidence attached to the Motion, both entities received the Notices on
21 December 3, 2018, and again on December 4.

22 The December 3 delivery to Mr. Scali’s office constitutes receipt by Momentum, regardless of
23 whether Mr. Scali gave the Notices to Mr. Hassanally or not. Mr. Scali is Momentum’s registered agent
24 for service of legal documents, as well as one of Momentum’s attorneys in this case, and California law
25 is clear that “notice to an agent is equivalent to notice to the principal” where the agent acts within the
26 scope of his or her authority. *See, e.g., Zurich Ins. Co. (U.S. Branch) v. Killer Music, Inc.*, 998 F.2d
27 674, 679 (9th Cir. 1993) (the principal’s failure to receive notice “is immaterial” where notice is given to
28 the agent); *see also* Cal. Corp. Code § 17701.16 (delivery to an agent for service of process is deemed

1 service on a limited liability company); Cal. Corp. Code § 15901.16 (same for a limited partnership). It
2 is indisputable that Mr. Scali's authority included receipt of legally significant documents such as the
3 Notices. *See, e.g.,* Cal. Sec. of State, *Instructions for Completing the Statement of Information*, Form
4 LLC-12, <https://bpd.cdn.sos.ca.gov/llc/forms/llc-12.pdf> (2018) (an LLC's agent for service "is
5 responsible for accepting legal documents," including "legal notices"). Under California law,
6 Momentum received the Notices when Mr. Scali's office, as Momentum's agent, signed for them.

7 Momentum argues that the delivery to Mr. Scali's office was invalid because it "was not
8 provided for in the terms of the [dealer] agreement." (Opposition at 4.) Yet Momentum fails to
9 confront the fact that it again received the Notices on December 4, 2018, when they were signed for at
10 the dealerships' mailing addresses, consistent with the dealer agreements and Secretary of State filings.
11 (Motion at Ex. 2 (proofs of delivery), Ex. 3.A at 1 (showing Fairfield CJD, LP's mailing address),
12 Motion at Ex. 1 (Vallejo CJD LLC filing indicating current mailing address), Ex. 3.A at Add'l
13 Provisions ¶ 43 (contractual notice provision providing for mailing of notices to the dealership entities).)

14 Moreover, Mr. Hassanally certainly knew that the Momentum dealerships were at risk of
15 termination, as evidenced by, among other things, the closure of multiple dealerships, FCA US's
16 November 16, 2018 notices of default, and the other notices of termination that Momentum had already
17 received from other franchisors. *See, e.g.,* Protest, *Fairfield Imports, LLC v. Toyota Motor Sales, USA,*
18 *Inc.*, Protest No. PR-2579-18, at ¶ 6 (filed Dec. 7, 2018) (acknowledging receipt of Toyota's notice of
19 termination on November 27, 2018). Despite this, it appears from Momentum's Opposition that Mr.
20 Hassanally has left California and become a "resident of the state of Texas." (Opposition, Hassanally
21 Decl., ¶ 1.)¹

22 Under Momentum's reading of Section 3060, the president of a shuttered dealership would be
23 entitled to leave the state, instruct his attorneys and employees not to forward him any termination
24 notices, and thereby indefinitely extend the protest clock—all while the dealership sits closed to the
25 public. This risk of service-evasion is precisely why California law requires business entities to appoint

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27 ¹ FCA US also sent the Notices to what it understood to be Mr. Hassanally's home address in
28 California. Consistent with Mr. Hassanally's declaration in support of the Opposition, the Post Office
delivered the mailing to a forwarding address in Dallas, Texas. (Motion at Ex. 2.)

1 registered agents, and why the dealer agreements contemplate receipt of notices by mail to the
2 dealership entities. Accordingly, as explained above, receipt by Momentum's agents at Scali Rasmussen
3 and the dealership's mailing addresses *was* receipt by Momentum. These Protests were filed more than
4 ten days after Momentum's receipt of the Notices, so the Protests must be dismissed as untimely.

5 ***B. Momentum's Cited Case Law Demonstrates that Termination Protests Are Moot Where***
6 ***the Franchisee Cannot Reopen Under Current Ownership.***

7 Momentum next argues that the Protests are not moot because Momentum has unspecified
8 pending offers to purchase the dealerships, and a purchaser would be able to restart operations at the
9 dealership premises. (Opposition at 5-6.) As its sole support, Momentum quotes *Powerhouse*
10 *Motorsports Grp., Inc. v. Yamaha Motor Corp., U.S.A.* for the proposition that a manufacturer in
11 termination proceedings "ha[s] the burden of establishing it had a good faith belief that dealer had gone
12 out of business, and that dealer would not reopen the business even if the dealership were sold to [a]
13 prospective purchaser." (Opposition at 5 (quoting *Powerhouse*, 221 Cal. App. 4th 867, 875 (2013)
14 (Momentum's internal bracketing omitted)).² Momentum misconstrues the *Powerhouse* decision, as
15 well as the related termination protest discussed therein, which in fact directly support FCA US's
16 mootness argument.

17 The above quotation regarding the manufacturer's burden was not the court's holding, as
18 Momentum claims, but rather a brief and somewhat muddled summary of this Board's decision
19 dismissing the related termination protest, which was not on appeal before the court. A review of the
20 termination protest decision reveals that the Board held the opposite of what Momentum suggests. In
21 the termination protest, the dealer, like Momentum, argued that it "cannot be deemed to be going out of
22 business" for purposes of Section 3060 "if some other dealer takes over the dealership location" through
23 a sale of the franchise. Protest No. PR-2122-08, at ¶¶ 103-04 (N.M.V.B. June 5, 2009) (Decision). The
24 Board expressly rejected this argument, concluding that "a proposed buy/sell, even if approved, would

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26 ² Momentum also asserts generally that "a dealer not in operation continues to enjoy the protections
27 of the Vehicle Code." (Opposition at 5.) But this assertion, even if true, is irrelevant. FCA US has not
28 argued that the Vehicle Code does not apply to Momentum. Rather, the protests must be dismissed as
moot because a decision of this Board cannot restore Momentum's dealership operations.

1 not 'reopen' [a] franchise" that has gone dark, and that sale prospects do not affect a manufacturer's
2 grounds for termination. *Id.* at ¶ 116; *see also id.* at ¶ 104 ("[W]hen you close a K-Mart and you then
3 open a Wal-Mart at the same location, this is not a reopening. K-Mart is out of business.").

4 The *Powerhouse* court decision nowhere questions the Board's holding or suggests that its
5 dismissal order was improper. As Momentum recognizes, the court case concerned the manufacturer's
6 bad-faith refusal to consent to sale—a separate issue legally irrelevant to the termination protest.
7 *Powerhouse* is also factually inapposite: the manufacturer in that case received a finalized buy/sell
8 proposal, lulled the dealer into believing it would not terminate until it had considered the proposal, then
9 quickly terminated the dealer anyway. 221 Cal. App. 4th at 882–83. FCA US, by contrast, has not
10 received a finalized buy/sell pursuant to Cal. Veh. Code § 11713.3(d)(2)(A).

11 As explained in the Motion—and as uncontested by the Opposition—Momentum has no
12 prospect of reopening the dealerships. That, combined with the fact that Momentum has failed to
13 conduct its customary sales and service operations for more than seven days—a fact that Momentum
14 also does not contest—warrants termination under Vehicle Code § 3060(a)(1)(B)(v).

15 Momentum's argument about the receivership is fatal to its Protests because it comes with the
16 acknowledgement that the dealerships have been put into receivership. The entire thrust of
17 Momentum's argument is that FCA US cannot demonstrate a good faith belief that Momentum has gone
18 out of business. That argument (which is wrong for the reasons stated above) is only relevant under
19 Vehicle Code § 3060(a)(1)(B)(v), which provides that failure to conduct customary sales and service
20 operations is grounds for termination. But FCA US has also issued the Notices on the basis of, among
21 other things, § 3060(a)(1)(B)(iii), which provides for termination if there has been a filing of any
22 petition by or against the franchisee under any bankruptcy or receivership law. The Opposition makes
23 no argument why termination under § 3060(a)(1)(B)(iii) is not warranted, nor could it make such an
24 argument. Momentum cannot rely on the fact of its own receivership or the efforts of its receiver to
25 avoid termination, because the receivership itself is grounds for termination.

1 ***C. Momentum's Resale Value, If Any, Does Not Create a Genuine Dispute Regarding***
2 ***FCA US's Good Cause to Terminate.***

3 Momentum's final argument is that its franchise rights and assets "still have value," creating a
4 genuine dispute over the second "good cause" factor, which considers Momentum's "investment
5 necessarily made and obligations incurred . . . to perform its part of the franchise." (Opposition at 6-7.)
6 Momentum raises no purported factual issues other than this one—it does not contest, and cannot
7 contest, the overwhelming evidence relied upon by FCA US in the Notices and the Motion regarding
8 Momentum's failure to operate and its insurmountable financial problems. And, Momentum cites no
9 authority for the notion that it can preclude termination by pointing to a single "good cause" factor that it
10 claims weighs in its favor. To the contrary, both the California Court of Appeal and the Board have
11 recognized that proof of any one factor is irrelevant where good cause exists as a matter of law. *See*
12 *Duarte & Witting, Inc. v. New Motor Vehicle Bd.*, 104 Cal. App. 4th 626, 642–43 (2002) (consideration
13 of individual "good cause" factors, including the dealer's investments and obligations, was unnecessary
14 where the manufacturer "clearly [had] good cause to terminate the franchise"); *M&M Automotive Grp.,*
15 *Inc. v. Infiniti West*, Protest No. PR-2360-13, at ¶ 28 (N.M.V.B. June 26, 2013) (Decision) (recognizing
16 the Board's authority to dismiss a protest "where there is an overriding issue that renders a merits
17 hearing on the standard good cause factors moot").

18 Regardless, even the "good cause" factor Momentum relies on—its "investment" and
19 "obligations" to perform the franchise—favors FCA US as a matter of law. As the Board has
20 recognized, the factor concerns whether the dealer has "[m]ade the investment necessary and incurred
21 the obligations *necessary to perform its part*" of the franchise; if the dealer has made insufficient
22 investments or taken on irresponsible obligations, those investments and obligations should not, and do
23 not, weigh against termination. *Serpa Auto. Grp. v. Volkswagen of Am., Inc.*, Protest No. PR-1977-05,
24 at ¶¶ 135, 87-88 (N.M.V.B. Sept. 28, 2006) (Decision) (emphasis added); *see also Porter Auto Grp.,*
25 *L.P. v. FCA US LLC*, Protest Nos. PR-2534-17 *et al.*, at ¶ 55 (N.M.V.B. June 29, 2018) (Decision)
26 (factor weighed against a franchisee whose dealership had gone out of business). Momentum's
27 understanding of the factor, by contrast, would automatically favor the franchisee and postpone
28

1 termination in every case, since any “franchisee” with standing to file a termination protest must, *by*
2 *definition*, still possess the “blue sky” or franchise value.

3 In essence, Momentum’s Opposition asks this Board to ignore the elephant in the room: that
4 Momentum faces tens of millions of dollars in debt, is in receivership, seeks to liquidate the dealerships
5 for the benefit of Momentum’s creditors, and has no hope or desire to reopen the dealerships. As this
6 Board recognized in *Porter*, circumstances as dire as these negate any “investment” and “obligations”
7 Momentum once had. *See Porter* PR-2534-17 *et al*, at ¶ 55 (“Whatever investment may have been
8 made by Porter was lost prior to the notices of termination. . . . Porter’s interests in its inventory and
9 other assets have also been lost . . . Porter is in debt for millions of dollars that it is unable to repay.”).
10 Momentum’s arguments to the contrary are to no avail, and the uncontested evidence demonstrates that
11 FCA US has good cause to terminate Momentum Vallejo and Momentum Fairfield as a matter of law.

12 **CONCLUSION**

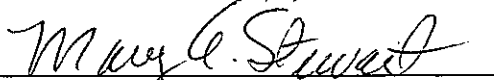
13 For the reasons stated above, Respondent respectfully requests the relief set forth in the Motion:

- 14 1. An order dismissing with prejudice and refusing to hear the above-captioned Protests,
15 because the Protests are untimely and moot, and because the uncontested evidence shows
16 that FCA US has good cause to terminate the dealer agreements; and
17 2. Such other and further relief as the Board deems proper.

18
19 Dated: February 26, 2019

20 DONAHUE DAVIES, LLP

21 By



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PROOF OF SERVICE

CAPTION: VALLEJO CJD LLC and FAIRFIELD CJD, LP, Protestants
v. FCA US LLC, Respondent

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: PR-2589-18, PR-2590-18, PR-2591-18, PR-2592-18, PR-2593-18, PR-2594-18,
PR-2595-18, PR-2596-18.

I am employed in the City of Sacramento and County of Sacramento, State of California. I am over the age of 18 years and not a party to this action. My business address is P.O. Box 277010, Sacramento, California 95827-7010.

On **February 26, 2019**, I served the foregoing REPLY IN SUPPORT OF RESPONDENT FCA US LLC'S MOTION TO DISMISS PROTESTS, OR, IN THE ALTERNATIVE, FOR A FINDING OF GOOD CAUSE TO TERMINATE BASED ON UNCONTESTED EVIDENCE on each party in this action, as follows:

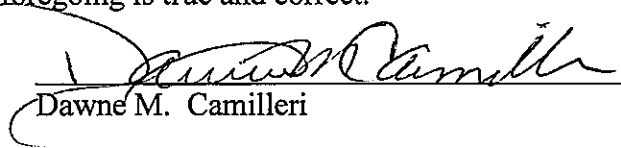
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☐ (BY MAIL) I caused such envelope to be deposited in the United States Mail at Sacramento, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United States postal service each day and that practice was followed in the ordinary course of business for the serve herein attested to.

☐ (BY E-MAIL) at the e-mail address listed above.

Executed on **February 26, 2019**, at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.


Dawne M. Camilleri